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Al Sarip bin Ambong v Public Prosecutor

B COURT OF APPEAL (KOTA KINABALU) — CRIMINAL APPEAL NO S-05–121–05 OF 2014
ZAWAWI SALLEH, PRASAD ABRAHAM JJCA AND ZALEHA YUSOF J
15 MARCH 2016

C *Criminal Procedure — Appeal — Appeal against conviction and sentence — Whether trial judge considered evidence that appellant sustained injury — Whether trial judge put extra burden for self-defence — Whether appellant established reliable evidence for self-defence — Whether trial judge erred in fact when he inferred that appellant took knife — Whether conviction safe — Penal Code s 302*

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On 7 November 2011, the appellant (the deceased's first cousin) went to the deceased's house and spent a night there. At the time of the incident, the deceased, the appellant and PW2 (the appellant's sister) were in the living E room, the deceased was sleeping. PW2 then went into a nearby room which was about 30 feet away. Moments later PW2 heard the deceased cried in pain. PW2 rushed to the living room and saw the appellant had opened the grill door and ran out. PW2 heard the deceased said 'Diki kenapa kau buat aku begini' and he then leaned against the door in pain. PW2 saw a broken bloodied knife F with its holder on the floor, which she recognised as her kitchen knife. The accused then ran to his uncle's ('PW5') house and apologised to PW5 for having stabbed the deceased. PW5 later called the police and the accused was arrested. The forensic pathologist, PW12 confirmed that the deceased suffered from two stab wounds on his left chest which damaged the covering of the G heart and vessels. PW12 opined that the two stab wounds would have caused death of the deceased. The scientific officer, PW13 confirmed that the DNA profile from the bloodied knife matched that of the deceased. At the end of the prosecution case, the learned judge found that, the prosecution had adduced credible evidence to make out a prima facie case. In defence, the appellant H contended that he acted in self-defence. The appellant said that during the incident, he had confronted the deceased and called the deceased an animal for having an affair with his wife. Angry with the appellant, the deceased fetched a knife from the kitchen and lunged at the appellant twice and there was a struggle between them. The appellant said he snatched the knife and was acting I in self-defence. The appellant alleged he suffered a cut on his right palm. The appellant then ran to the PW5's house as he wanted to apologise for fighting with the deceased. At the end of the trial, the learned judge concluded that the prosecution had established its case beyond reasonable doubt. The appellant was convicted and sentenced to the mandatory death penalty. Hence, this

appeal. The appellant submitted that (a) the learned trial judge erred when he rejected evidence that the appellant sustained injuries; (b) the learned trial judge had erred in law when he had put extra burden on the appellant of the need to tell someone after the incident that he was acting in self-defence; and (c) the learned trial judge erred in his finding of facts by inferring that the appellant was the one who took the knife from the kitchen.

Held, dismissing the appeal:

(1) As contrary to the appellant's contention, His Lordship did take into account the evidence given by the appellant that his right palm was injured and had appraised the evidence carefully. However, His Lordship rejected the appellant's contention that the injury was a serious injury that would tantamount to the defensive wound as even the investigating officer who took the appellant to the hospital did not notice it, neither did the doctor as it was not mentioned in the medical report. The investigating officer was not questioned on this issue either (see para 21).

(2) The court was of the view that the passage taken from the grounds of judgment of the learned trial judge did not indicate that such extra burden had been put on the appellant that he needs to tell someone after the incident that he was acting in self-defence. What the learned trial judge had stated was merely to emphasise his findings on the credibility of the appellant. Mere making allegation was not sufficient to sustain a right of self-defence. The appellant needed to establish by some reliable evidence that the injury found on his palm was caused by the deceased during the so called 'argument' as would justify him to 'accidently' stabbed the deceased. Self-defence does not and cannot extend to the inflicting of more harm than is necessary to inflict for the purpose of defence. Thus there was no merit on this issue raised by the appellant (see paras 25 & 29).

(3) The learned trial judge was right to infer that the deceased was sleeping and that there was nobody else in the living room present but the appellant and the deceased. The appellant had himself given evidence during cross-examination that he had been to the house on five separate occasions. Hence, it could be inferred that the accused knew where the kitchen was located and therefore knew where to look for the knife. As the deceased was asleep, he could not have gone in a split second to the kitchen to obtain the knife. Thus, the court agreed with the learned trial judge that the inferential evidence irresistibly pointed to the conclusion that it was the accused and no other person had obtained the knife and stabbed the deceased (see para 32).

[Bahasa Malaysia summary

Pada 7 November 2011, perayu (sepupu pertama si mati) pergi ke rumah si mati dan bermalam di sana. Pada masa kejadian, si mati, perayu dan PW2 (kakak perayu) berada di ruang tamu, si mati sedang tidur. PW2 kemudiannya masuk ke dalam sebuah bilik berdekatan iaitu kira-kira 30 kaki. Sejurus kemudian PW2 terdengar si mati menangis kesakitan. PW2 bergegas ke ruang tamu dan ternampak perayu membuka pintu grill dan berlari keluar. PW2 mendengar si mati berkata 'Diki kenapa kau buat aku begini' dan dia kemudian bersandar di pintu, kesakitan. PW2 nampak sebilah pisau berlumuran darah yang patah dengan pemegangnya di atas lantai, yang dikenalinya sebagai pisau dapurnya. Tertuduh kemudiannya berlari ke rumah bapa saudaranya ('PW5') dan meminta maaf kepada PW5 kerana telah menikam si mati. PW5 kemudian menghubungi polis dan tertuduh ditangkap. Pakar patologi forensik, PW12 mengesahkan bahawa si mati mengalami dua kesan tikaman di dada kirinya yang merosakkan penutup jantung dan pembuluh darah. PW12 berpendapat bahawa kedua-dua kesan tikaman menyebabkan kematian si mati. Pegawai saintifik, PW13 mengesahkan bahawa profil DNA daripada pisau berlumuran darah tersebut berpadanan dengan si mati. Pada penutup kes pendakwaan, hakim yang bijaksana mendapati bahawa, pihak pendakwaan telah mengemukakan keterangan yang boleh dipercayai untuk membuktikan kes prima facie. Dalam pembelaan, perayu berhujah bahawa dia bertindak mempertahankan diri. Perayu berkata bahawa semasa kejadian tersebut dia telah berdepan dengan si mati dan memanggil si mati binatang kerana mempunyai hubungan sulit dengan isterinya. Marah dengan perayu, si mati mengambil pisau dari dapur dan menerpa ke arah perayu dua kali dan berlaku pergelutan antara mereka. Perayu berkata dia merampas pisau dan bertindak mempertahankan diri. Perayu mendakwa dia mengalami luka di tapak tangan kanannya. Perayu kemudian berlari ke rumah PW5 kerana dia mahu meminta maaf kerana melawan si mati. Pada penutup perbicaraan, hakim yang bijaksana menyimpulkan bahawa pihak pendakwaan berjaya membuktikan kesnya melampaui keraguan munasabah. Perayu disabitkan dan dijatuhi hukuman hukuman mati mandatori. Oleh itu, rayuan ini dibuat. Perayu berhujah bahawa (a) hakim perbicaraan yang bijaksana terkhilaf apabila beliau menolak keterangan bahawa perayu mengalami kecederaan; (b) hakim perbicaraan yang bijaksana terkhilaf dari segi undang-undang apabila beliau meletakkan beban tambahan ke atas perayu mengenai keperluan untuk memberitahu seseorang selepas insiden bahawa dia bertindak mempertahankan diri; dan (c) hakim perbicaraan yang bijaksana terkhilaf dalam dapatan faktanya dengan mengandaikan bahawa perayu adalah orang yang mengambil pisau dari dapur.

Diputuskan, menolak rayuan:

(1) Bercanggah dengan hujahan perayu, Yang Arif telah mengambil kira keterangan yang diberikan oleh perayu bahawa tapak tangan kanannya

telah cedera dan menilai bukti tersebut dengan teliti. Walau bagaimanapun, Yang Arif menolak hujah perayu bahawa kecederaan tersebut merupakan kecederaan serius yang terjumlah kepada luka defensif memandangkan pegawai penyiasat yang membawa perayu ke hospital juga tidak menyedari, begitu juga dengan doktor kerana kecederaan itu tidak disebut dalam laporan kesihatan. Pegawai penyiasat juga tidak dipersoalkan mengenai isu ini (lihat perenggan 21).

(2) Mahkamah berpendapat bahawa petikan yang diambil daripada alasan penghakiman hakim perbicaraan yang bijaksana tidak menunjukkan bahawa beban tambahan telah diletakkan ke atas perayu bahawa dia perlu memberitahu seseorang selepas insiden tersebut bahawa dia bertindak mempertahankan diri. Apa yang dinyatakan hakim perbicaraan yang bijaksana adalah semata-mata untuk menekankan dapatannya ke atas kredibiliti perayu. Hanya membuat dakwaan adalah tidak mencukupi untuk mengekalkan hak mempertahankan diri. Perayu perlu membuktikan dengan keterangan yang boleh dipercayai bahawa kecederaan yang ditemui pada tapak tangannya adalah disebabkan oleh si mati semasa 'pertengkaran' yang mewajarkannya untuk 'secara tidak sengaja' menikam si mati. Mempertahankan diri tidak dan tidak boleh dilanjutkan kepada mengenakan bahaya lebih daripada perlu untuk dikenakan bagi tujuan pertahanan. Oleh itu tiada merit dalam isu ini yang dibangkitkan oleh perayu (lihat perenggan 25 & 29).

(3) Hakim perbicaraan bertindak tepat dengan membuat kesimpulan bahawa si mati sedang tidur dan bahawa tiada orang lain yang berada di ruang tamu kecuali perayu dan si mati. Perayu sendiri telah memberikan keterangan semasa pemeriksaan balas bahawa dia telah ke rumah sebanyak lima kali. Oleh itu, boleh disimpulkan bahawa tertuduh tahu di mana letaknya dapur dan oleh itu tahu di mana untuk mencari pisau. Memandangkan si mati sedang tidur, dia tidak boleh pergi dalam sekelip mata ke dapur untuk mendapatkan pisau. Oleh itu, mahkamah bersetuju dengan hakim perbicaraan yang bijaksana bahawa bukti inferens secara jelas menunjukkan kepada kesimpulan bahawa tertuduh dan tiada orang lain yang mendapatkan pisau dan menikam si mati (lihat perenggan 32).]

Notes

For cases on appeal on conviction and sentence, see 5(1) *Mallal's Digest* (5th Ed, 2015) paras 301–419.

Cases referred to

Abdul Samid bin Edward v PP [2015] 4 MLJ 58; [2015] 4 CLJ 149, CA (refd)
George v State of Karala [1960] Cri LJ 589 (refd)
Mohd Fadzil Ibrahim & Anor v PP [2013] 1 CLJ 77, CA (refd)
Muneswaran Ramasamy lwn PP [2016] 2 CLJ 210, CA (refd)
PP v Ngoi Ming Sean [1982] 1 MLJ 24 (refd)

A *Sunny Ang v PP* [1966] 2 MLJ 195; [1965] LNS 71, FC (refd)

Legislation referred to

Evidence Act 1950 ss 32(1)(a), 97, 100
Penal Code s 302

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Abdul Gani Zelika (Johari & Zelika) for the appellant.
Hamdan bin Hamzah (Deputy Public Prosecutor, Attorney General's Chambers) for the respondent.

C **Zaleha Yusof J:**

INTRODUCTION

D **[1]** The appellant was charged before the High Court at Tawau with the murder of one Muslim bin Sammah by stabbing him with a knife, contrary to s 302 of the Penal Code ('the Code'). He was convicted by the learned trial judge and sentenced to the mandatory death penalty.

E **[2]** The charge preferred against him reads as follows:

> That you on the 8th day of November 2011 at about 9.30 am at House No. 161, Jambatan No. 3, Miles 4 in the district of Tawau, in the State of Sabah, did commit murder by causing the death of one MUSLIM BIN SAMMAH and that you have thereby committed an offence punishable under section 302 of the Penal Code (Act 574).

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[3] The appellant being dissatisfied with his conviction and sentence, has now appealed to this court on both conviction and sentence.

G THE PROSECUTION'S CASE

[4] Muslim bin Sammah, the deceased, was the appellant's first cousin. The deceased and his family lived in a wooden house at the address as stated in the charge, together with his sister, one Saliha bt Sammah ('PW2'), their parents and PW2's husband and children.

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[5] On 7 November 2011, after being chased out from his house by his father for assaulting his wife, the appellant went to the deceased's house and spent a night there sleeping in the hall/living room. The next morning, while the deceased was still asleep at the living room and PW2 tending to her children at the same room, the appellant came and asked PW2 why was the deceased still sleeping. PW2 told the appellant that the deceased had a habit of returning to sleep after he had breakfast. PW2 then went into a nearby room which was about 30 feet away with her children. Moments later which she described as

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'selangkah kemudian', PW2 heard the deceased cried in pain. PW2 rushed to the living room and saw the appellant had opened the grill door and ran out. PW2 heard the deceased said 'Diki kenapa kau buat aku begini' and he than leaned against the door in pain. PW2 screamed for assistance. The deceased was later sent to the hospital by their neighbours. PW2 then saw a broken bloodied knife with its holder on the floor, which she recognised as her kitchen knife, in the living room. She had used it two days before the incident to open a milk can.

[6] Meanwhile, the accused ran to his uncle's ('PW5') house and apologised to PW5 for having stabbed the deceased. PW5 inquired the reason to which the accused replied 'Si Kuang naik ke atas rumah'. PW5 later called the police and the accused was arrested. The forensic pathologist, PW12 confirmed that the deceased suffered from two stab wounds on his left chest. The stab wounds damaged the covering of the heart and blood vessels. PW12 opined that the two stab wounds would have caused death of the deceased. The scientific officer, PW13 confirmed that the DNA profile developed from the bloodied knife recovered at the crime scene matched that of the deceased.

FINDINGS OF THE HIGH COURT AT THE END OF THE PROSECUTION'S CASE

[7] The learned trial judge found that the prosecution had established a prima facie case against the appellant. He opined that the prosecution had adduced credible evidence in respect of three essential elements or ingredients to make out a prima facie case. Those are as follows.

Ingredient 1: That the deceased died of the two stab wounds inflicted on him

[8] There was evidence that there were two stab wounds on the deceased's left chest. It was established that the stab wounds cut the covering of the heart, the interventricular septum, the left lung, and the blood vessels supplying the heart. The injuries according to PW12 had caused the left lung to be collapsed and bleeding into the covering of the heart and the left chest cavity. PW12 opined and the learned trial judge accepted it, that a sharp weapon such as a knife could have caused the stab wounds.

Ingredient 2: That the appellant had inflicted the said wounds on the deceased with a knife

[9] Although PW2 did not actually see the appellant stabbing the deceased, the learned trial judge was of the view that the inferential evidence irresistibly points to the conclusion that it was the appellant who had stabbed the deceased. The learned trial judge found that there was no evidence to show that there was an argument between the deceased and the appellant. PW2, in her

A evidence, stated that she did not hear any raised voices except a cry of pain from the deceased. PW2's evidence was unshaken and she denied that it was the deceased who took the knife and the appellant was merely acting in self-defence. The appellant is also a close relative to PW2. The learned trial judge found there was no evidence that PW2 harboured any grudges against
B the accused. PW2 in her evidence said she also heard the deceased uttering the words 'Diki kenapa kau buat aku begini' (Diki is the appellant's nickname). The learned trial judge opined that the deceased last words is admissible as dying declaration under s 32(1)(a) of the Evidence Act 1950. There was also evidence of PW5 who told the court that the appellant had confessed to
C stabbing the deceased and asked for forgiveness. PW5, in the trial judge's opinion, is a credible witness. He is an elder to both the deceased and the appellant. From the evidence adduced, the trial judge came to a conclusion that the appellant respected PW5 as he had gone to PW5's house to apologise.

D *Ingredient 3: That the appellant's act came within the ambit pursuant to s 300 of the Penal Code*

[10] PW12, in her evidence, had ruled out chances of survival from the said stab wounds. According to her, the injuries inflicted are deep incised wounds
E measuring 9cm. The human heart is on the left side of the chest. Based on this evidence, the learned trial judge was of the view that it can be reasonably inferred that the appellant intended to cause the death of the deceased or at the very least he had knowledge that the wounds he inflicted would cause death in the ordinary cause of nature. Alternatively, the appellant should have known
F that stabbing the deceased twice with a sharp knife on the part of the body where the heart is located is so imminently dangerous that it must in all probability cause death or such bodily injury as is likely to cause death.

THE DEFENCE'S CASE

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[11] It was the appellant's contention that he acted in self defence. According to the appellant, prior to the incident, the appellant had an argument with his wife because he suspected that his wife was having an affair with the deceased. He admitted spending a night at the deceased's house the night before the
H incident.

[12] On the fateful morning, the appellant said that the appellant had an argument with the deceased. The appellant claimed that he had confronted the deceased and called the deceased an animal for having an affair with his wife.
I The deceased was angry and fetched a knife from the kitchen. The deceased lunged at the appellant twice and there was a struggle between them. The appellant said he snatched the knife and was acting in self defence. The appellant alleged he suffered a cut on his right palm. The appellant later ran away and the deceased managed to give chase half way before he collapsed. The

appellant ran to the PW5's house as he wanted to apologise for fighting with the deceased.

FINDINGS OF THE HIGH COURT AT THE CONCLUSION OF THE TRIAL

[13] The learned trial judge found that the appellant did not specifically say that he stabbed the deceased. His evidence was as follows:

> Q: Macamana si mati kena tikam di dada? Boleh jelaskan?
>
> A: Sebab saya rebut pisau itu jadi si mati tolak saya dan saya tolak balik dia. Si mati tolak lagi dan saya tolak balik dia.

[14] The learned trial judge stated that the appellant must establish private defence on a balance of probabilities. And if there is reasonable doubt whether he had acted in self defence or otherwise, the appellant should be given the benefit of the doubt and the court would record an acquittal. However, the appellant's evidence according to the learned trial judge is not believable on the grounds:

> There was evidence of PW2 that PW2 was in her room which was only 30 feet away. Hence, if there was an altercation, PW2 would have heard or seen it as there was no door between the living room and PW2's room. If the deceased went to the kitchen, PW2 would have seen him. PW2 was empathic that there could not have been any argument because she only left the living room for a short moment. The terms used by PW2 were 'selangkah kemudian'. Even though PW2 did not see the accused holding the knife that does not tantamount to discrepancy in PW2's evidence. The handle was broken and the blade had slipped to the floor. The learned trial judge found that PW5 provides strong corroborative evidence to the evidence of PW2. The appellant had been to PW2's house on five separate occasions and he could have known where the knife was kept. There was nothing to suggest that the appellant suffered a defensive wound. The learned trial judge opined that the appellant could have injured his palm when the blade slipped off its handle;
>
> The learned trial judge was also of the view that since the police were not in possession of any fingerprint evidence, it is therefore unnecessary to speculate what they would have revealed. His lordship felt, there could not be any suppression when the evidence was not available in the first place. His lordship further opined that there was nothing to suggest that the appellant's act fall within the special exception under s 300 of the Code. The appellant, the learned trial judge found, did not establish private defence on a balance of probabilities. His evidence also did not cast any doubt to the prosecution's case. The learned trial judge concluded that the prosecution had established its case beyond reasonable doubt.

A THE APPEAL

[15] Before us, learned counsel for the appellant had raised three issues as follows:

B (a) that the learned trial judge erred when he rejected evidence that the appellant sustained injuries;

(b) that the learned trial judge had erred in law when he had put extra burden on the appellant of the need to tell someone after the incident that he was acting in self defence; and

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(c) that the learned trial judge erred in his finding of facts by inferring that the appellant was the one who took the knife from the kitchen.

[16] We will as such deal only with these three issues.

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[17] On the first issue, learned counsel for the appellant had reffered to the evidence of PW5 during cross-examinations as follows:

> Q: Apabila Diki memegang tangan kamu, adakah kamu nampak tangan
E Diki terluka juga?
>
> A: Ada saya nampak darah di tepi tangan Diki.

Learned counsel also reffered to the evidence of the appellant as follows:

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> Q: Ada kamu luka?
>
> A: Ada di tapak tangan (witness points to his right hand palm)
>
> Q: Ada berdarah?
>
G A: Ada
>
> Q: Waktu kamu sampai rumah Encik Talib, adakah Encik Talib nampak tangan kamu berdarah?
>
> A: Ya.

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[18] It was submitted by learned counsel for the appellant that the learned trial judge erred as he had failed to consider those evidence.

I **[19]** With due respect to learned counsel for the appellant, our perusal of the learned trial judge grounds of judgment showed that the learned trial judge at p 23 of his grounds of judgment did consider those evidence when he stated as follows:

> The DNA report revealed that the accused's blood was found on his pants. The accused told the court that he suffered a wound on his hand. PW5 also said that there was blood on the hand of the accused. Counsel for the accused submitted that the wound on the palm of the accused is defensive wound which corroborates the version of the accused that he was acting in self defence.

[20] Hence, it is not true that the learned trial judge did not consider the evidence that the appellant's palm was injured. However, having considered the same, His Lordship was not convinced that it was a defensive wound for the following reasons:

> At the time of the trial, which is about two years after the incident, there is no evidence that accused suffered any serious injury to his hand. The investigating officer sent the accused upon arrest to the hospital for blood sample and nail clippings to be collected. However, investigating officer did not say that he noticed any defensive wounds on the accused. Counsel for the accused did not put to the investigating officer that the accused was injured either. The hospital did not prepare any medical report on the accused either. It must be presumed that in the normal course of things, if the accused was badly injured he would have been given medical attention at the hospital. Therefore the only inference that can be drawn is that the accused suffered minor injury to his palm as he held the knife and stabbed the deceased with great force.

[21] Based on the above, we, therefore, are of the view that the learned trial judge did not commit any error on the first issue, as contrary to the appellant's contention, His Lordship did take into account the evidence given by the appellant that his right palm was injured. However, His Lordship rejected the appellant's contention that the injury was a serious injury that would tantamount to the defensive wound as even the investigating officer who took the appellant to the hospital did not notice it, neither did the doctor as it was not mentioned in the medical report. The investigating officer was not questioned on this issue either. The learned trial judge had appraised the evidence carefully and we, therefore, are not at liberty to differ as there is obviously no reason to do so.

[22] On the second issue, learned counsel for the appellant had pointed out the following passage in the learned trial judge ground of judgment to support his submission that the learned trial judge had erred in law by putting extra burden on the appellant of the need to tell someone after the incident that he was acting in self defence.

At p 176 line 26–30 ROA

> The accused told the court that the deceased got furious with him when the accused charged him with having an affair with his wife. The deceased then grabbed a knife from the kitchen and lunged at him twice. On both occasions, the accused managed

A to push back the deceased. It was implied in his evidence that the deceased got stabbed in the process. *However, I find that the evidence of the accused is not believable*.

And at p 184 line 28–5 (p 185) ROA

B However, he did not tell PW5 that he was acting in self defence when he stabbed the deceased. If it was true that the accused acted in self defence when he stabbed the deceased, it would have been logical and natural for the accused to say so to his uncle as he had gone to his house to seek protection. Instead, he merely asked for forgiveness for stabbing the deceased.

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[23] Quoting *Dr Hari Singh Gour's Panel Law of India* (11th Ed) Law Publisher (India) Prt Ltd at p 803 and *George v State of Karala* [1960] Cri LJ 589, learned counsel for the appellant submitted that the right of private defence does not need to be specifically pleaded by an accused. A person taking D the plea of private defence is also not required to call evidence on his side, but he can establish that plea by reference to circumstances transpiring from the prosecution evidence itself. The question in such a case would be a question of assessing the true effect of the prosecution evidence and not a question of the accused discharging any burden. It was further submitted that it is well settled E that even if the accused does not plead self defence, it is open to the court to consider such a plea if the facts and circumstances of the case make out such a case. Learned counsel for the appellant further submitted that the appellant in the instant appeal had put and disclosed his plea for private defence through cross-examination of PW1.

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[24] Section 97 of the Code provides, inter alia, that every person has a right to defend his own body against any offence affecting the human body. Section 100 of the same lays down, inter alia, the circumstances in which the G right of private defence of the body extends to the voluntary causing of death; if the assault which occasions the exercise of the right, reasonably causes the apprehension that death or grievous hurt would otherwise be the consequence thereof.

H **[25]** With due respect to learned counsel for the appellant, we are of the view that the passage taken from the ground of judgment of the learned trial judge does not indicate that such extra burden had been put on the appellant that he needs to tell someone after the incident that he was acting in self defence. What the learned trial judge had stated is merely to emphasise his findings on the I credibility of the appellant. The Court of Appeal in *Mohd Fadzil Ibrahim & Anor v Public Prosecutor* [2013] 1 CLJ 77 at p 88 has stated the following:

[33] It is trite that every right must be given to the learned trial judge whether to believe and accept the evidence of a witness who has given evidence before her. The learned trial judge has the audio visual advantage of seeing and assessing the

credibility of the witness. She is entitled to believe or disbelieve the witness. She may accept his evidence wholly or reject some. The discretion is solely hers and of course it goes without saying that that discretion must be exercised judiciously. The learned trial judge simply meant that she has seen, heard and observed the witnesses and was satisfied with the manner the witnesses were giving evidence.

[26] It was the appellant's evidence that he and the deceased quarrelled in loud voice for about five minutes before the incident took place. However, PW2 told the court that she had left the deceased and the appellant for a short moment when she went to her room. The learned trial judge had established that there was no door between the living room and PW2's room and that the PW2's room was only 30 feet away. Hence, PW2 would surely hear if there was any loud argument, as claimed by the appellant, between the appellant and the deceased. She told the court during cross-examination that she did not hear any argument between them and the learned trial judge found her evidence on this point was firm and there was no reason for His Lordship to disbelieve her.

[27] The learned trial judge also found that the evidence of PW5 who is an uncle to both PW2 and the appellant provided strong corroborative evidence that PW2 was telling the truth. The learned trial judge had stated the following in His Lordship judgment:

PW5 said as follows when counsel for the accused put to him during cross-examination that the deceased told him that he was defending himself:

> Q: Saya katakan kepada kamu apabila Diki pergi ke rumah kamu pada hari kejadian, dia ada memberitahu kamu bahawa dia telah diserang oleh Kuang dengan pisau.
>
> A: Tidak ada
>
> Q: Dia juga memberitahu kamu dia terpaksa mempertahankan diri?
>
> A: Tidak ada

Despite repeated questioning, PW5 insisted that the accused never told him that he was acting in self defence when he stabbed the deceased. There is no suggestion from the accused or his counsel that PW5 was deliberately and purposely lying about this crucial point. There is no evidence from the accused either to the effect that he was on bad terms with his uncle to the extent thathis uncle would perjure himself to deprive him of a valid defence.

[28] In *Abdul Samid bin Edward v Public Prosecutor* [2015] 4 MLJ 58; [2015] 4 CLJ 149 at para 43–44, the Court of Appeal had stated as follows:

A [40] It should be noted however that the learned judge's statement was to the effect that as a fact he found there was no defensive wound suffered by the appellant. We take the statement to mean that on evidence led before the court, His Lordship was not satisfied that a defensive wound as claimed, had been inflicted on the appellant's body.

B [41] It was, in our view, incumbent upon defence always to have pursued to obtain such relevant medical evidence, (as adverted to by the PW8) and to have it adduced in court to establish that the wounds suffered by the appellant were indeed in the nature of 'defensive wound. This had not been done despite such avenue being open and within the powers of the defence to do so at the trial, if that was the case.

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[29] We are of the view, mere making allegation is not sufficient to sustain a right of self defence. The appellant needs to establish by some reliable evidence that the injury found on his palm was caused by the deceased during the so called 'argument' as would justify him to 'accidently' stabbed the deceased. The D medical report states that the estimated depth of each of the two stab wounds found on the deceased was nine centimeters. Nine centimeters wounds were deep wounds. It implies that the act of stabbing the deceased twice was done with force. Was the act of stabbing twice with such force necessary for self E defence? We are of the view that self defence does not and cannot extend to the inflicting of more harm than is necessary to inflict for the purpose of defence (see *Public Prosecutor v Ngoi Ming Sean* [1982] 1 MLJ 24).

[30] We, therefore, find no merit on the second issue raised by learned F counsel for the appellant.

[31] On the last issue, it was learned counsel for the appellant's argument that the learned trial judge erred on his lordship's finding of fact when he made an inference that it was the appellant who took the knife from the kitchen when G there was no such evidence adduced during the trial. He further submitted that there was no scientific evidence to suggest or prove that the appellant's fingerprint was found on the knife or its handle. In fact, there was no evidence according to him, to suggest that the appellant was holding the knife before the incident or at the time when the deceased and the appellant were standing H facing each other at the door of the house.

[32] We deliberated on this issue and found there is nothing wrong for the learned trial judge to come up with such an inference. It is a finding of fact by the learned trial judge that the deceased was sleeping at the material time and I that there was nobody else in the living room present but the appellant and the deceased. The appellant had himself given evidence during cross-examination that he had been to the house on five separate occasions. Hence, we agree with the learned trial judge that in the premises, it can be inferred that the accused knew where the kitchen was located and therefore knew where to look for the

knife. As the deceased was asleep, he could not have gone in a split second to the kitchen to obtain the knife. We, therefore, agree with the learned trial judge that the inferential evidence irresistibly points to the conclusion that it was the accused and no other person had obtained the knife and stabbed the deceased.

[33] We are satisfied that the evidence adduced irresistibility pointed to the guilt of the appellant and the appellant alone (see *Sunny Ang v Public Prosecutor* [1966] 2 MLJ 195; [1965] LNS 71 and *Muneswaran Ramasamy lwn Public Prosecutor* [2016] 2 CLJ 210).

CONCLUSION

[34] We are of the view that the learned trial judge had considered carefully all of the evidence adduced at the trial, assessed the credibility of the witnesses and evaluated the circumstances surrounding the incident. On our part, we have given every consideration to submissions made by learned counsel for the appellant as well as the learned deputy public prosecutor. We are not with the appellant on the issues raised and find no reason to disturb the finding of the learned trial judge on those issues. We are satisfied that the conviction is safe. The appeal is, therefore, dismissed and the conviction and sentence of the learned trial judge is affirmed.

Appeal dismissed.

Reported by Dzulqarnain Ab Fatar